

**WIJEYARATNE AND ANOTHER
v.
SOMAWATHIE**

COURT OF APPEAL
TILAKAWARDANE, J. AND
UDALAGAMA, J.
CA NO. 736/86 (F)
DC GALLE NO. 9795/L
APRIL 03, 2001 AND
MAY 17, 2001

Rei vindicatio action – Due execution of a deed – Proof of due execution – Balance of probability – Notaries Ordinance, s. 31(15) and s. 33 - Placing of thumb impression without a mark by the executant – Validity – Prevention of Frauds Ordinance, s. 2.

Held:

- (1) Proof of due execution would be on a balance of probability.
- (2) Non-compliance of the Rules in section 31 of the Notaries Ordinance does not invalidate a deed. Section 33 protects a deed.
- (3) The absence of a mark by the executant at most would be non-observance by the Notary of the Rules specified in section 31.

Per Udalagama, J.

"It is my view that the essential element of due execution is to comply with the provisions of section 2 of the Prevention of Frauds Ordinance."

APPEAL from the judgment of the District Court of Galle.

P. A. D. Samarasekera, PC with Keerthi Sri Gunawardena for defendant-appellants.

N. R. M. Daluwatte, PC with Gamini Silva for plaintiff-respondent.

June 08, 2001

UDALAGAMA, J.

The plaintiff by his plaint dated 31. 08. 81 in District Court of Galle case No. 9795/L complained to Court that the defendant forcibly entered the land, morefully described in paragraph (2) of the plaint, on 29. 07. 81 and was in unlawful possession of same and claimed declaration of title to the land, for ejection of the defendants and for damages. Reciting title to the corpus called Mahawatte, Lot No. (2) depicted in plan No. 1355 and described as an extent of 06 perches the plaintiff stated as follows: That by final decree in partition case No. 4665/P of the District Court of Galle that the 2nd defendant in that case, namely, Samaraweera Dona Elsina, whilst the said case was pending on deed No. 986 dated 11. 03. 70 transferred all her rights, title and interest to one Hendrick Appuhamy who by his deed No. 16127 dated 26. 03. 86 transferred the said corpus to the plaintiff. 1

The 1st and 2nd defendants in their answer stated that they were unaware of the aforesaid transfer by Elsina on deed No. 986 aforesaid and that the plaintiff had no possession and that the defendants were in lawful possession. The defendants also stated that Elsina aforesaid who was entitled to lot (2), vide final decree in 4655/L of the District Court of Galle by deed No. 3511 dated 17. 10. 79 transferred same to the 1st defendant and that from that date the 1st defendant became entitled to lot (2) and entered into possession thereof. The defendants also stated that they continue to be in possession. 10

When the case was taken up for trial it was admitted that Elsina referred to above was at one time entitled to the corpus. The case went to trial on 9 issues and the dispute centered around the two contesting deeds said to have been executed by Elsina aforesaid. Vide issue No. 5. It appears that the validity of deed 986 referred to above had also been questioned. 30

The evidence commenced with one Suraweera who gave evidence on behalf of the plaintiff. He was the husband of the plaintiff. It must be noted that evidence commenced on 7th February, 84 and that deed No. 986 referred to above was dated 11. 03. 70. Thus, evidence was recorded approximately 14 years after the execution of the said deed. It was the position of this witness that the vendee on deed 986 aforesaid was his brother and the latter was not informed of the said deed No. 986. It was also his position that since he was a Government servant he was precluded from buying immovable property without Government sanction, and that he purchased same in his brother's name, who by deed No. 16127 dated 26. 03. 81 transferred same to the plaintiff, his wife. In the course of his evidence he explained the incident of the attestation of deed No. 986 referred to above on 11. 03. 70 before the Notary and in the presence of witnesses stating further that Elsinä the vendor referred to above placed her thumb impression before the Notary and the two witnesses. He also stated that on 29. 06. 81 approximately ten years later when he attempted to put up a parapet wall on the property the Police, on a complaint made by the defendants prevented him from completing building the parapet wall. This witness admits in cross-examination that he bought this property in the name of his brother as he was a Government servant, but later states that he, in fact, was a retired Government teacher and admits that there was no bar to buying the property in his own name even with the permission of the Government. However, he did concede that an application to the Government seeking the necessary permission would have taken time and that in all probability by the time he obtained such permission, the land could very well have been sold. He also admits that he did not state to the Notary that he was purchasing the property in the name of the brother. Significantly, he also states that Elsinä signed this deed as the vendee before her own son Suriaarachchi who was also a witness to the deed. It was also the position of this witness that although he did not know the Notary, he knew the Notary's clerk and further explained the

incident of attestation which he states took place at about 4 or 4.30 p.m. and that by that time the clerk to the Notary had prepared the deed for signature and that he paid Rs. 100 to Elsina before the Notary. However, in cross-examination he was made to admit that he had previously paid Rs. 50/- and the balance 70 Rs. 50/- was paid before the Notary. In re-examination his position was that Elsina is still alive but sick and bedridden and that if needed the thumb impression placed on the deed could be verified at any time.

Piyadasa, the Notary's clerk, referred to above, stated that Elsina came to the office and signed the deed before the Notary, Mr. Tissa Disanayaka and the two witnesses. Of the witnesses he was one of them and the other was Elsina's son Suriaarachchi referred to above. It was also his position that the Notary read out the deed to the persons present. In cross-examination it was elicited 80 that the aforesaid Disanayaka was also an Attorney-at-law apart from being a Notary. Elsina's son who subsequently gave evidence admitted and confirmed the fact that his mother had been paralysed. It was also his position that his mother Elsina consented to the transfer and that the deed was signed before him and the other witness and the vendor and that the Notary read out the contents of the deed before attestation.

The aforesaid Disanayaka, Notary Public, and Attorney-at-law also testified explaining the procedure that was followed when executing a deed and he further testified to his coming to his office, reading 90 the contents of the deed to the parties which was signed by the witnesses and the vendor before attestation by him. He was unable to say the exact time at which the deed was so attested but admitted that the deed was prepared by his clerk. The plaintiff having closed his case, the defendant Punchibanda who testified subsequently stated that he purchased the corpus from Elsina aforesaid, on deed No. 3511 dated 17. 10. 79 in his son's name and that he entered into possession thereof. This being the only evidence on behalf of the defendants,

subsequent to the closure of the case for the defence the learned District Judge proceeded to enter judgment in favour of the plaintiff against which judgment dated 22. 11. 85 the defendants-appellants seek to appeal. ¹⁰⁰

It is common ground that Dona Elsinia was entitled to the land which is described in paragraph (2) of the plaint under the final decree in DC Galle case No. 4665/L. It was also admitted that she had by deed No. 3511 dated 17. 10. 79 conveyed the said lot (2) to the said defendant. Thus, as stated earlier the dispute in this case was whether the deed 986 dated 11. 03. 70 attested nine years earlier was duly executed. As stated above it is apparent that the petitioner is contesting the validity of deed 986 referred to above on the basis that same was not duly and properly executed. In this regard, proof of due execution would be on a balance of probability. The evidence of the witnesses must also be considered and evaluated taking into account the fact that deed 986 referred to above had been executed 14 years before the evidence was recorded. ¹¹⁰

As the learned District Judge had correctly stated contradictions of a minor nature would be natural considering the mental capacity, age, recollection powers of witnesses and as stated above the lapse of time.

The learned President's Counsel for the appellants queried the absence of the signature or mark of the executant in deed 986 referred to above, as provided for by section 31 (15) of the Notaries Ordinance. Apart from the fact that even the petitioners deed, bearing No. 3511 referred to above also executed by Elsinia, not having the latter's signature or mark and not even been proved, the placing of the thumb impression without a mark by an executant would not invalidate a deed. Non-compliance of the Rules in section 31 of the Notaries Ordinance does not invalidate a deed as provided for by section 33 of the same Ordinance. That section protects the deed. The absence of a mark by the executant at most would be non-observance by the Notary of the rules specified in section 31 aforesaid. As stated by the learned Counsel for the appellants, although a possibility exists for obtaining a thumb impression of a person who is dead, unconscious, asleep or when intoxicated in the instant case the person who accompanied the executant was ¹²⁰

no other than the executant's own son who later testified to a conscious act of her mother when describing the incident of attestation referred to above. It is my view that the essential element of due execution is to comply with the provisions of section (2) of the Prevention of Frauds Ordinance and as stated by E. R. S. R. 140 Coomaraswamy in 'The Conveyancer and Property Lawyer', vol. 1, part 1 (1945) "Non-compliance with the provisions of the Notaries Ordinance will not invalidate a deed as long as the provisions of section 2 of the Prevention of Frauds Ordinance are complied with".

It was not the position of the appellants that section (2) of the Prevention of Frauds Ordinance was violated.

The contention of the appellants that the vendor and the vendee although alive, were not called to give evidence thereby causing doubts as to the validity of deed 986 referred to above is not tenable as the execution of the said deed had been adequately proved, 150 on a balance of probability. Considering the evidence led in the lower Court, I see no reason to interfere with the learned District Judge's finding of fact. Having given my mind to the lapse of time between the execution of the impugned deed and the date of testimony, age of witnesses and other relevant material, I hold that the learned District Judge has on a balance of probability, come to a correct finding that deed No. 986 dated 11. 03. 70 was the act and deed of Yasine Samaraweera Dona Elsinna and that the deed was duly executed. Contradictions referred to in the testimony of witness for the plaintiff are not material to cast doubts as to due execution and the validity 160 of deed 986 aforesaid.

As stated above, I find no reason to interfere with the judgment of the learned District Judge dated 22. 11. 85 and proceed to dismiss this appeal with taxed costs.

TILAKAWARDANE, J. – I agree.

Appeal dismissed.